Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MIRON CONSTRUCTION CO., INC.,

Petitioner

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139,

Respondent

and

WISCONSIN LABORERS DISTRICT COUNCIL,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When two labor organizations claim the same work from the same Employer, and the employer has collective bargaining agreements with each detailing the same work, and both file grievances claiming the same work, should the court order tripartite arbitration to avoid the possibility of conflicting arbitration awards?

If one labor organization is assigned the disputed work under Section 10(k) of the National Labor Relations Act (29 U.S.C. 160[k]), is that decision dispositive of a subcontracting grievance filed by the labor organization which was not awarded the work by the National Labor Relations Board under Section 10(k)?

PARTIES TO THE PROCEEDINGS BELOW

Miron Construction Co., Inc., was the Plaintiff-Appellant in the 7th Circuit Court of Appeals in Case Nos. 94-1546 and 94-1646. International Union of Operating Engineers, Local 139 was the Defendant-Appellee, Cross-Appellee and Wisconsin Laborers District Council was the Defendant-Appellee, Cross-Appellant.

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Miron Construction Company, Inc., petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Seventh Circuit, entered January 6, 1995, in Case Nos. 94-1546 and 94-1646, in which the Court of Appeals affirmed the February 9, 1994, decision of the United States District Court for the Eastern District of Wisconsin

OPINIONS BELOW

The decision and opinion of the 7th Circuit Court of Appeals entered on January 6, 1995, is unreported and appears in Petitioner's Appendix. The February 9, 1994, decision of the United States District Court for the Eastern District of Wisconsin appears in Petitioner's Appendix.

JURISDICTION

The opinion below was entered on January 6, 1995. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. 160(k) **[Hearings on jurisdictional strikes]** Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. 185 (a) **[Venue, amount and citizenship]** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [chapter], or between any such labor organization, may be brought in any district court of the United States controversy or without regard to the citizenship of the parties.

(b) **[Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgements]** Any labor organization which represents employees in an industry affecting commerce as defined in this Act [chapter] and any employer whose activities affect commerce as defined in this Act [chapter] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgement against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) **[Jurisdiction]** For the purposes of actions and proceedings by or against labor organizations in the district

court of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) **[Service of process]** The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) **[Determination of question of agency]** For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

Petitioner Miron Construction Company, Inc., is a general contractor who, on two separate occasions, subcontracted masonry work to mason contractors who have agreements with the Laborers' International Union of North America to run the forklift which operates on mason jobs. Both unions have filed grievances against Miron Construction Company demanding assignment of the mason-tending forklift. In one of the cases, the National Labor Relations Board assigned the work to the Laborers. The other case has not been resolved by the National Labor Relations Board.

Miron Construction Company did not want to become involved in the burdensome situation detailed in ***Hutter Construction Co. v. International Union of Operating Engineers, Local 139*** 862 F2d 641 (7th Cir., 1988) and opted for tri-partite arbitration.

Two of Miron Construction Company's Wisconsin projects in 1992 are involved in this case. During both of those projects, Miron subcontracted masonry work to companies which Respondent, Operating Engineers Local 139, alleges that it does not have an agreement with. Local 139 filed two grievances against Miron, one for each project. For several years, masonry contractors have used one or more forklifts to service the masons. Both the Operating Engineers and Laborers have claimed the right to run the forklift (see page 4a, Footnote 8 of 7th Circuit Court's opinion in the Appendix). Upon learning of the Operating Engineers' grievances, the Laborers also filed grievances against Miron indicating that they would be prejudiced if the forklift assignment were changed. Miron brought a federal court action in the United States District Court for the Eastern District of Wisconsin asking for an order that the parties engage in tri-partite arbitration. Both the Operating Engineers and Laborers were named defendants. The Operating Engineers moved for summary judgement asking the court to dismiss the lawsuit and asking for an order for bi-partite arbitration. Miron moved for summary judgement requesting an order for tri-partite arbitration. The United States District Court for the Eastern District of Wisconsin granted the Operating Engineers Local 139's motion for summary judgement and dismissed the complaint and granted Local 139's counterclaim for bi-partite arbitration. Miron's motion was denied along with motions by Respondent Wisconsin Laborers' Council.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT IN CIRCUIT COURT DECISIONS.

These cases have taken two directions depending on whether the employer has assigned its own employees to the disputed work or whether the employer has subcontracted the disputed work.

The Seventh Circuit decision in this matter has outlined both directions. In each situation in the case at bar, the Petitioner subcontracted the work to another company. Petitioner had agreements with the Operating Engineers and the Laborers. In each case, the company receiving the subcontract utilized Laborers to run the forklift. In one of the cases, in a Section 29 U.S.C.A. 160(k) (Section 10(k)) proceeding, the Laborers were awarded the work by the National Relations Board. In *Hutter Construction Co. v. International Union of Operating Engineers, Local 139*, 862 F.2d 641 (7th Cir., 1988), the 7th Circuit said this type of case was not jurisdictional whereas in a case with similar facts, *Local 513, International Union of Operating Engineers v. J.S. Alberici Construction Company*, 936 F.2d 390 (8th Cir., 1991), the 8th Circuit Court of Appeals said that the matter was jurisdictional (also see *Construction and General Laborers' Local No. 190, AFL-CIO v. National Labor Relations Board*, 998 F.2d 1064, 1066, 302 U.S. App.D.C. 429, 431 (U.S.C.A., D.C. Cir., 1993). In the *Local 190* decision, Circuit Judge D.H. Ginsburg states the sister circuits are divided on the question as to whether subcontracting disputes are also jurisdictional disputes.

II.

CONCEPTUALLY, THERE SHOULD BE NO DIFFERENCE BETWEEN A WORK ASSIGNMENT GRIEVANCE AND A SUBCONTRACTING GRIEVANCE.

As the 7th Circuit pointed out in this case at page 12a of its decision in the Appendix, "When an arbitration award is in conflict with the decision of the NLRB in a Section 10(k) proceeding, the NLRB decision takes precedence. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964). It appears that principal applies when the contractor assigns its own employees to a task and the contractor's employees who belong to another union grieve the work assignment. If the employees assigned the work win the 10(k) hearing, the other employees cannot prevail in a work assignment grievance arbitration because of *Carey*. That type of arbitration would be bi-partite. Why should the union which loses the 10(k) be able to process a subcontracting grievance arbitration in a bi-partite arbitration and not be able to process a work assignment grievance arbitration. This line of thinking appears inconsistent.

The United States District Court for Eastern District of Wisconsin took no testimony and granted summary judgement to the Operating Engineers for bi-partite arbitration. Petitioner maintains that if arbitration is required, it should be tri-partite as both the Laborers and Operating Engineers have a vested interest in the outcome.

Like the dispute between the Painters and Operating Engineers in *Alberici, supra,* the dispute between the Laborers and Operators over the assignment of forklift work has been ongoing (see page 4a of the 7th Circuit's opinion in this case, footnote 8, in the Appendix.)

Petitioner further takes issue with the 7th Circuit's characterization of the *Alberici*. The 8th Circuit actually said "***If*** (emphasis added) proof were needed of this proposition, it is

supplied by the fact that six other non-signatory subcontractors have performed work on the project without objection by Local 513." (See *Alberici* decision, page 392). Petitioner takes the position that this dictum does not support the proposition that the subcontracting dispute was nothing more than a cover for a jurisdictional dispute. Petitioner takes the position that this statement by the 8th Circuit was nothing more than afterthought and the statement was not the nub of the 8th Circuit's decision.

Also, since no testimony was taken, Petitioner challenges the 7th Circuit's finding (at page 11 of its decision) that the Operators have consistently enforced the subcontracting clause in the Area II Agreement.

CONCLUSION

For the foregoing reasons, Petitioner prays that this petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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